IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI SOUTHERN DIVISION

BIG TIME VAPES, INC. and UNITED STATES VAPING ASSOCIATION, § INC., § § § Plaintiffs, Civil Case No. 1:19-cv-531-LG-JCG § v. § § § DECLARATORY AND INJUNCTIVE FOOD AND DRUG ADMINISTRATION; NORMAN E. RELIEF REQUESTED "NED" SHARPLESS, M.D., in his official capacity as Acting Commissioner **§ § § §** of Food and Drugs; and ALEX M. AZAR, II, in his official capacity as Secretary of Health and Human Services, Defendants.

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs file this response to the Defendants' motion to dismiss, filed under Federal Rule of Civil Procedure 12(b)(6), and respectfully request that the Court deny Defendants' motion to dismiss for the reasons stated in the memorandum filed herewith. Specifically, the Court should deny Defendants' motion outright because Plaintiffs' complaint clearly states a plausible claim to relief under the nondelegation principle (and given such, the Declaratory Judgments Act affords a potential remedy in addition to any other remedies available). But even if the Court were doubtful as to whether Plaintiffs have stated a plausible claim, the motion should be denied because Plaintiffs are entitled to reasonable and necessary discovery related to their claims and the Defendants' defenses. Plaintiffs further object to any consideration of any evidence relied

upon or incorporated in Defendants' motion to dismiss or otherwise outside of Plaintiffs' complaint.

Respectfully submitted,

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*Motion for admission pro hac vice forthcoming.

Counsel for Plaintiffs

Certificate of Service

I do hereby certify that I have electronically served the foregoing Reply using the Court's ECF system, which sent notification to all known counsel of record.

THIS, the 20th day of November, 2019.

/s/ Spencer M. Ritchie
Spencer M. Ritchie